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~~No. 07-206~~

In the Supreme Court of the United States

PATRICK GRANT DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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Petitioner contends (Pet. 10-17) that the court of appeals failed to defer to a district court's application of the sentencing factors set forth in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004) in accordance with *United States* v. *Booker*, 543 U.S. 220 (2005), and thereby negated the advisory character of the Guidelines. He argues (Pet. 17) that the Court should hold the petition in this case pending its decision in *Gall v. United States*, No. 06-7949 (to be argued Oct. 2, 2007), in which this Court granted certiorari to address the question whether, when determining the "reasonableness" of a district court decision under *Booker*, the strength of the reasons for a variance from the United States Sentencing Guidelines should vary proportionally to the degree of the variance.

While this Court could choose to hold the petition in this case for *Gall*, the two cases are in different proce-

dural postures, and it appears to be unnecessary to hold the petition in order to allow petitioner to obtain the benefit of any favorable aspects of a decision in *Gall*. The court of appeals in this case reversed petitioner's downward variance to probation, both because the district court incorrectly calculated the Guidelines range,[1] and because the court of appeals found the sentence to be substantively unreasonable.[2] Pet. App. A17. Because

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[1] Petitioner was found guilty of conspiring to defraud the United States, in violation of 18 U.S.C. 371, and of willfully failing to file income tax returns, in violation of 26 U.S.C. 7203. Pet. App. A3. Petitioner's presentence report (PSR) estimated his unpaid taxes to be $347,134. *id.* at A11-A12. Under Sentencing Guidelines § 2T4.1(G) (2003), that amount of tax loss generated a Sentencing Guidelines offense level of 18, and the PSR recommended a two-level reduction under Guidelines § 3E1.1(a) for petitioner's alleged acceptance of responsibility. See *ibid.* The district court agreed. The court of appeals held that the district court erred by refusing to count amounts of unpaid state taxes in determining the advisory guidelines range, Pet. App. A13-A14, and erroneously granted petitioner acceptance of responsibility credit, *id.* at A14-A15.

[2] The district court justified its probation sentence (from a range of 21-27 months of imprisonment) because of petitioner's charitable works, his efforts to pay his tax debt, and the court's determination that imposing a jail sentence on petitioner would adversely affect petitioner's employees; the court also held that a sentence of confinement was not needed to deter future criminal conduct or protect the public. Pet. App. A59, A62-A63. After holding that the district court erroneously calculated the guidelines range, the court of appeals offered "brief comments" on the issue of reasonableness "as an aid to the district court on remand." *Id.* at A16. First, the court of appeals indicated that the district court "acted unreasonably in entirely discarding deterrence as a consideration in imposing sentence." *Ibid.* Second, the court of appeals believed that the probation sentence failed to reflect the seriousness of the offense or to provide just punishment. *Ibid.* Third, the court was "troubled by the heavy reliance of the district court on

the case has been remanded for resentencing, the petition is interlocutory. This Court customarily declines review of cases in that posture. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (interlocutory status of the case "of itself alone furnishe[s] sufficient ground for the denial" of the petition); Robert L. Stern et al., *Supreme Court Practice*, § 4.18, at 258 n.9 (8th ed. 2002). In addition, any implications of this Court's decision in *Gall* can be addressed by the district court in the first instance, or, if petitioner or the government challenges the new sentence, on a direct appeal from the resentencing. Accordingly, denial of the instant petition would not prejudice petitioner.

Nevertheless, because the course of resentencing proceedings could be affected by this Court's decision in *Gall*, the Court may wish to hold the petition pending the decision in that case, and then dispose of the petition as appropriate in light of that decision.[3]

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

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[petitioner's] charitable works." *Id.* at A17 (citing Guidelines § 5H1.11, p.s.).

[3] The government waives any further response to the petition unless this Court requests otherwise.